

Untitled

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)

Fitchburg Gas and Electric Light Company) D.T.E. 99-66

)

THE ATTORNEY GENERAL'S OPPOSITION

TO THE APPEAL OF A HEARING OFFICER'S RULING

Pursuant to 220 C.M.R. § 1.10(1) and § 1.06 (6)(d), the Attorney General opposes the interlocutory appeal of a Hearing Officer's ruling that excluded evidence from the record filed by Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company"). In its appeal the Company asks the Commissioners to overturn a Hearing Officer's February 14, 2001 decision excluding from the record certain internal documents prepared by the staff of the Department of Telecommunications and Energy ("Department"). The internal Department staff notes, however, are irrelevant, not probative of the issues in this proceeding and are otherwise properly excluded from the record. The Hearing Officer's ruling should be affirmed.

INTRODUCTION.

After the record initially closed in this proceeding, the Department discovered several boxes of its own files which contained Fitchburg Cost of Gas Adjustment Clause ("CGA") filings for the years 1987 to 1993 that it had previously been unable to locate. As a result of this discovery, the Department reopened the hearings to take further evidence on these CGA filings.

Included in those 1987 to 1993 CGA files were internal staff memoranda and notes of Richard Norris, a former Department analyst. During the reopened hearings, the Hearing Officer, on his own motion, excluded from the record the notes and memoranda of former Department employee Norris. The Hearing Officer concluded that Mr. Norris's notes "have no probative value to the Department's investigation." Tr. 4, p. 483. He stated in detail that:

Richard Norris was a former employee, a staff person, with no decision-making

Untitled

authority or power; and in fact, the Commission did not, and has not, delegated its authority to Richard Norris or to any other staff person.

Therefore, the notes of this staff person, in particular, could have no probative value to the Department's investigation in terms of how the Department reviewed these filings.

Further, I find that arguments can, and have been, made by the company without the introduction into the record of Mr. Richard Norris's notes.

I find that the notes of Mr. Norris are tenuous at best, in that Mr. Norris did not have any decision-making authority in these filings, as the Commission only has the authority to approve or deny any filings at the Department.

In summation, I find that while Dick Norris's notes have been included in the prefiled testimony of Karen Asbury, Appendices A through L, in Fitchburg Gas & Electric Exhibit 3, that those notes should be excluded from introduction into the record.

Tr. 4, pp. 483-484. The Company has appealed this ruling.

ARGUMENT.

The Hearing Officer's Ruling Should Be Affirmed.

The Company argues that the excluded information constitutes "pertinent evidence" that has "probative value on the issue of the reasonableness of FG&E's actions." Fitchburg Appeal, p. 8). The Department's regulations, however, invest the Hearing Officer with the discretion to evaluate the admissibility of evidence into the record. 220 C.M.R. § 1.06(6)(a) ("The presiding officer shall . . . make all decisions regarding the admission or exclusion of evidence or any other procedural matters which may arise in the course of the hearing.") With respect to questions concerning the admissibility of the evidence, the Hearing Officer "shall follow the rules of evidence observed by courts when practicable and shall observe the rules of privilege recognized by law" 220 C.M.R. § 1.10(1).

The Hearing Officer specifically found that the internal notes of Richard Norris have "no probative value to the Department's investigation." (Tr. 4, pp. 483-84). In so ruling, the Hearing Officer determined that the notes were "irrelevant" since they implicitly did not tend to rationally prove or disprove a fact material to the case. (1) The Department's Notice posited three questions for resolution: "(1)

Untitled

whether Fitchburg over-collected for costs related to gas inventory; (2) the amount of any such over-collection; and (3) whether Fitchburg's ratepayers are entitled to reimbursement for any over-collection." Notice Of Investigation, D.T.E. 99-66, November 1, 1999. Mr. Norris's notes do not address any of these issues. As the Hearing Officer elaborated, the Commissioners had not delegated their decisional authority to any staff analyst. Therefore, the notes of Mr. Norris are not relevant to the issue of the Department's review and/or approval these filings or the resolution of the three issues that are the subject of the investigation in this matter. The Hearing Officer properly excluded the internal staff notes from the administrative record. (2) *Towns of Norfolk & Walpole v. United States Army Corps of Engineers*, 137 F.R.D. 183, 186-87, 188 (D. Mass. 1991), affirmed, 968 F.2d 1438 (1st Cir. 1992).

CONCLUSION

For the reasons stated above, the interlocutory appeal of the Company should be denied in full. The Hearing Officer properly excluded evidence from the record that he determined to be irrelevant and this decision should be affirmed on appeal.

RESPECTFULLY SUBMITTED,

THOMAS REILLY

ATTORNEY GENERAL

By:

Alexander J. Cochis

Assistant Attorneys General

Regulated Industries Division

200 Portland Street, Fourth Floor

Boston, MA 02114

(617) 727-2200 x. 3447

Date: February 26, 2001

1. Massachusetts case law defines as "relevant" such evidence that demonstrates a "rational tendency to prove an issue in the case." *Commonwealth v. Fayerweather*, 406 Mass. 78, 83, 546 NE2d 345 (1989). "The concept of relevancy thus has two components: (1) the evidence must have some tendency to prove or disprove a particular fact; and, (2) that particular fact must be material to an issue in the

Untitled

case." Liacos, §4.1.1 Handbook of Massachusetts Evidence, p. 108 (7th ed. 1999). Unless otherwise barred by operation of a rule, law or privilege, only relevant evidence is admissible. Green v. Richmond, 369 Mass. 47, 59, 337 NE2d 691 (1975).

2. For the same reasons, Fitchburg's alternative form of relief on appeal of requesting that Mr. Norris be examined as a witness in this proceeding on a reopened record is futile. (Fitchburg's interlocutory appeal, p. 10). If the notes of Mr. Norris are excluded, then surely testimony on the same subject of those notes would also be inadmissible. In addition, Fitchburg had nearly a year to locate and secure the testimony of exculpatory witnesses before the record closed for a second time. In fact, the Hearing Officer already allowed the Company to produce a new witness, Mr. James Harrison, on only twenty-four hours notice to the Attorney General. (Tr. 5, pp. 540-64). The Company has provided no just reason for opening this record for a third time when it already had more than adequate opportunity to present witnesses.